

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

5-2d
77-7008

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ANASTASIA KANDELL,

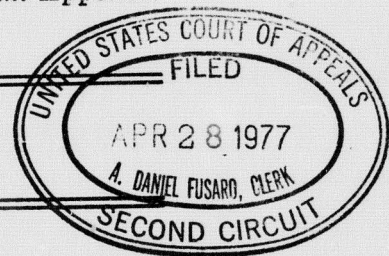
Plaintiff-Appellant,

against

RAYDELL PUBLISHING AND DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN,

Defendant-Appellee.

APPELLANT'S REPLY BRIEF



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UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 77-7008

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ANASTASIA KANDELL,

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APPELLANT'S REPLY BRIEF

In its Brief (p. 3), defendant states that there has been no testimony that "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund" (Appellant's Main Brief, p. 4) and that no letter of P.F.R. Planning, Inc., was introduced into evidence, although there is a reference to such a letter in the letter of Elliott Waldman appended to Plaintiff's Post-Hearing Memorandum (75a-76a).

The attachment of the Waldman letter to plaintiff's post-hearing memorandum - as well as that of Leonard I. Fischer (77a-78a) to plaintiff's supplemental post-hearing

memorandum - was made with the consent of the parties and the Court, in lieu of the attorneys furnishing the Court with a statement in writing giving each party's position, as requested by the Court at the conclusion of the trial (50a).

Although it is true that there is no independent evidence of this large surplus, it has not been denied that in its letter of April 8, 1975, P.F.R. Planning, Inc., did state that "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund. We have spread the surplus to Mr. Lussa's normal retirement date." Such a statement by the agency that "assisted in the design and installation of the Raydell Publishing & Distributing Corp. Employees Pension Plan, and have [sic], since the inception of the plan, acted as administrative pension consultants to the trustees of this plan" (Appellee's Br., p. 5) is convincing proof that there was in fact such a surplus created by the reduction of benefits in Mr. Kandell's death, which was spread to the remaining participant's normal retirement date. Moreover, it has not been denied that such was actually the case.

The "large surplus in the separate investment fund" created by Mr. Kandell's death which the pension consultants "have spread...to Mr. Lussa's normal retirement date" is the

sum of \$8,862.00, representing the difference between \$17,562.00, Mr. Kandell's portion of the auxiliary investment fund at the time of his death, and \$8,700.00, the amount tendered to the widow and named beneficiary.

Defendant's statement (Br., p. 6) that "[t]o pay the higher benefit as the Plaintiff demands could cause possible Internal Revenue Service disqualification of the plan, since it could be held that the overpayment was an attempt to discriminate in favor of highly paid employees" is wrong on a number of counts.

Since Kandell and Lussa, the two sole officers and directors of the Corporation, were the sole two participants in its pension plan, and both were drawing the same salaries, there is no basis for the fear that the payment of the amount demanded by plaintiff might be considered "an attempt to discriminate in favor of highly paid employees."

The tender of the lesser amount resulted in the large surplus which, according to the administrative pension consultants to the trustees, was spread to Mr. Lussa's normal retirement date. The benefit resulting from this spread did not, however, inure to Mr. Lussa for very long, since by the following November 15 (the anniversary date of the plan) the

corporation's contribution to the pension plan was presumably reduced by the amount of the "large surplus" realized by Kandell's death. In the final analysis, therefore, the large surplus was a windfall to the corporation and of no benefit to the surviving participant of the pension plan.

Finally, it is the refusal to pay the amount demanded by plaintiff that may cause possible Internal Revenue Service disqualification of the plan since payment of a lesser amount would be in violation of item 10 of the Adoption Agreement, as amended (52a).

Respectfully submitted,

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Of Counsel

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Reply Brief: IS HEREBY ADMITTED
THIS 28 DAY OF *April* 1977

Walter H. H. H.

Attorney(s) for